LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 3 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

October Term, 1970.

No. 1475.

BARBARA J. FUHRMAN, Administratrix of the Estate of Arthur J. Fuhrman, Deceased, et al.,
*Petitioners,*

*v.*

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE A/S.

## PETITION FOR REHEARING.

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
J. HAROLD TRAVERSE,
FREEDMAN, BOROWSKY AND LORRY,
Lafayette Building, 8th Floor,
Philadelphia, Pennsylvania. 19106
*Counsel for Petitioners.*

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1475.

BARBARA J. FUHRMAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. FUHRMAN, DECEASED, ET AL.,
*Petitioners,*

*v.*

UNITED STATES STEEL CORPORATION

and

DEN NORSKE AMERIKALINJE A/S.

## PETITION FOR REHEARING.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.*

This petition for certiorari was filed on behalf of seven personal injury claimants and three death claimants.

These claims arose out of a collision between the S/S "Cedarville" and a foreign vessel, the M/S "Topdalsfjord", on May 7, 1965 in a fog in Lake Michigan. Instead of evacuating the crew from the rapidly sinking "Cedarville" to another vessel which was standing by, the Captain, after a 15-minute delay and after telephone messages to the shore, proceeded in the fog to try and "beach" the vessel, which

was then proceeding at the rate of two miles per hour. The "Cedarville" shortly thereafter convulsed, turned over and sank, hurling the crew on deck into the icy waters, and taking those who were beneath the decks to their death.

Respondent shipowners filed petitions for limitation of liability, which were denied by Trial Judge James Connell, who then conducted hearings on the question of damages and allowed claimants to prove their injuries through the testimony of a psychiatrist and an orthopedist who had examined the claimants and, at the trial, testified to their injuries based on their examination and history. Judge Connell thereafter rendered specific awards to the individual claimants. The Court of Appeals for the Sixth Circuit reversed Judge Connell's holdings almost in toto, in complete conflict with the principles of law enunciated by this Court and by other Courts of Appeals. The Court below committed a further shocking act by remanding the case with instructions to re-evaluate the case on the basis of the existing record, after having excluded the testimony of the psychiatrist and the orthopedist.

This petition for certiorari was denied by this Court on May 17, 1971 with Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan stating that certiorari should be granted.

I. Even if we were to assume the correctness of the decision of the Court below in remanding the case to the trial court, under the decision of this Court in *Byrd v. Blue Ridge Rural Electric Company Cooperative, Inc.*, 356 U. S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958), the remand must allow the parties to introduce new evidence concerning any fact issue ruled on by the Court of Appeals.

In the *Byrd* case, this Court reversed the Court of Appeals and directed that the case be remanded with the right on the part of the parties to introduce new evidence in

connection with the disputed issue. Cf. *Fountain v. Filson*, 336 U. S. 681, 93 L. Ed. 971, 69 S. Ct. 754; *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801, 93 L. Ed. 1704, 69 S. Ct. 1326; *Globe Liquor Co. v. San Roman*, 332 U. S. 571, 92 L. Ed. 177, 68 S. Ct. 246; *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849, 67 S. Ct. 752.

Apparently the Court of Appeals, in excluding the testimony of the psychiatrist and the orthopedist, rested its conclusion on the principles of law followed in the state courts of Ohio that the testimony of experts must be based on a hypothetical question rather than on history elicited from the claimants. This Court stated, in *Garrett v. Moore-McCormack Lines, Inc.*, 317 U. S. 239, 87 L. Ed. 239 (1942), where the Supreme Court of Pennsylvania had ruled valid a seaman's release under the state rule of evidence, that the evidence to invalidate a release must be "clear, precise and indubitable". The Supreme Court of the United States reversed that holding and applied the admiralty rule that the burden of proof is on the shipowner to prove the validity of the release. The Supreme Court made crystal clear the fact that the body of federal law applied, since the cause of action arose under the federal law, and the federal rules of evidence, including admiralty, applied to the exclusion of the state law. In this case the law is clear that on remand the parties had a right to introduce new evidence to replace that which the reviewing court had held to be erroneously admitted. Unless this is done here, a grave injustice will be done because the parties will be deprived of their rightful benefits due from the injuries received in the disaster. Upon this ground alone certiorari should be granted to correct a grave injustice.

II. In setting aside the fact findings of Trial Judge Connell, the Court of Appeals below committed clear and grave error in violation of the rule laid down by this Court in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20

(1954). The rule does not permit the Court of Appeals to substitute its judgment for that of the fact finder if the record supports the findings of the fact finder. The action of the Court of Appeals was a complete misapplication of F. R. C. P. 52(a) and the "clearly erroneous" doctrine, as defined by this Court in the *McAllister* case. The record completely supports the holdings of the commissioners, one a dean of a law school and the other a former judge. These commissioners saw and heard the witnesses and were in the best position to judge their credibility and weigh the evidence. Their findings were reviewed by Trial Judge Connell and affirmed. The Court of Appeals cannot simply wash away those findings by stating that upon a review of the whole record the findings are erroneous. The record does not justify any such conclusion.

The Court of Appeals simply cited one incident from one of the cases and failed to analyze in its opinion the record itself. The record completely supports the commissioners, as Judge Connell found, and must be sustained under this Court's decision in *McAllister*. Upon this ground alone certiorari should be granted and the decision below reversed.

III. The holding of the Court below that the testimony of an expert based on history of the claimant is inadmissible is in conflict with the decisions of the Court of Appeals from other circuits. In the Second Circuit, the Court of Appeals, in *Reid v. Quebec Paper Sales and Transp. Co.*, 304 F. 2d 34 (1965), held the testimony of experts based on history to be admissible. The Seventh Circuit Court of Appeals ruled the same way in *Spillers v. Tri-State Glass Lined Storage, Inc.*, 325 F. 2d 322 (1963). The District of Columbia Circuit ruled such evidence to be admissible in *City-Wide Trucking Corp. v. Ford*, 306 F. 2d 805 (1962) and *Kaufman v. Kaufman*, 164 F. 2d 519 (1947). In view of the conflict of the

Court below with the decisions of other Circuits, this Court should grant certiorari in order, *inter alia,* to preserve uniformity.

IV. The Court of Appeals below erred also in overruling Judge Connell in his holding on the law of future earning capacity. The Court below took as the measure of future loss the average earnings for the past number of years. This clearly was not the measure of earning capacity since it failed to take into consideration the amount which the claimants would have earned immediately after the accident and in the future based on the inevitable wage increases which seamen have received since time immemorial. The record establishes that the wage rates in United States Steel increased on the average of five per cent annually. The present economic situation inevitably requires a holding that wage rates have in the past and will in the future increase not merely five per cent but by an amount greatly in excess of that figure. These are the factors which must be considered in determining loss of earning capacity. The Court of Appeals below grievously erred in ignoring this principle. Certiorari should be granted on this point alone.

The Court below short-changed the claimants in failing to allow future benefits based on increased earnings while at the same time it directed that all awards be reduced to present value. The future increases in earnings more than offset the discount in reducing the awards to present value. The Court of Appeals was therefore clearly in error in holding that the awards must be reduced to present value, while at the same time failing to make any allowance for increased future earnings.

V. The Court below erred in its interpretation of this Court's decision in *Michigan Central R. R. v. Vreeland,* 227 U. S. 59, 57 L. Ed. 417 (1913), which specifically recognized

that pecuniary loss includes awards to widows upon proof of loss of care, guidance and consortium. This Court, in *Michigan Central,* specifically so held.

VI. The Court of Appeals also reversed Judge Connell in his award of pre-judgment interest. This decision was in direct conflict with the decisions of other circuit courts, including the Second Circuit in *Petition of City of New York,* 332 F. 2d 1006 (1964), and *Moore-McCormack Lines, Inc. v. Richardson,* 295 F. 2d 583 (1961), wherein the Second Circuit held that pre-judgment interest in these admiralty cases is required. In this connection, even if the right to pre-judgment interest is a matter of discretion with the court, it must be noted that Judge Connell exercised that discretion in favor of an award. The Court of Appeals was therefore grossly in error in overruling Judge Connell on this point also.

For the foregoing reasons, it is respectfully submitted that certiorari should be granted and the decision below reversed.

Respectfully submitted,

Abraham E. Freedman,
Martin J. Vigderman,
J. Harold Traverse,
Freedman, Borowsky and Lorry,
*Attorneys for Petitioners.*

## CERTIFICATE OF COUNSEL.

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

*Counsel for Petitioners.*